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In The Supreme Court of the United States

TYREE ALPHONSO ROBERTS A/K/A ABDIYYAH BEN ALKEBULANYAHH,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

On Petition for Writ of Certiorari to the South Carolina Supreme Court

---

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a capital defendant waive his right to be present at the sentencing phase of his trial, where his absence during sentencing is the product of his trial strategy and the prosecution advances no countervailing reason for requiring him to be present?

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SUPREME COURT OF THE UNITED STATES

October Term, 2006

No. 06-_____

TYREE ALPHONSO ROBERTS
A/K/A ABDIYYAH BEN ALKEBULANYAHH,

PETITIONER,

versus

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

Counsel for Tyree Alphonso Roberts a/k/a Abdiyyah Ben Alkebulanyahh petitions the Court to issue a writ of certiorari to review the decision of the South Carolina Supreme Court affirming his death sentence.

CITATION TO OPINION BELOW

The South Carolina Supreme Court's opinion is reported as *State v. Tyree Alphonso Roberts a/k/a Abdiyyah Ben Alkebulanyahh*, 369 S.C. 580, 632 S.E.2d 871 (2006), and is printed in the Appendix to this petition at pages A1-A6 .

JURISDICTION

The final judgment of the South Carolina Supreme Court in this case was entered July 24, 2006. The Supreme Court denied rehearing August 11, 2006. (The petition for rehearing and order denying rehearing appear in the Appendix at pages A7-A11.)

The Court has jurisdiction pursuant to 28 U.S.C §1257(a), since Roberts/Alkbulanyahh is asserting the deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor,

> and to have the Assistance of Counsel for his defence.

It also concerns the Fourteenth Amendment, Section I, which provides that no State "shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACTS

For the purpose of this certiorari petition, counsel for Roberts/Alkebulanyahh adopt the statement of facts contained in the South Carolina Supreme Court's opinion in this case. There, the Court states in part:

> This is a capital case. Roberts was convicted of the murder of two Beaufort County Sheriff's Deputies and was sentenced to death. ... At the guilt or innocence phase of trial, he chose to represent himself.

632 S.E.2d at 872.

How the federal issue was raised below

Even before the jury concluded its deliberations in the guilt phase, Roberts/Alkebulanyahh informed the judge that he desired to waive his right to be present during the sentencing phase. ROA p. 3448, lines 20–23. The judge immediately responded, "I'm not going to get into a debate about that, because my intention is for you to be here." ROA p. 3448, lines 23–25. Roberts/Alkebulanyahh did not wish to participate. He explained, "I don't see where it would be

helpful to me in any type of manner... I don't see where it would, you know, do anything for me to no extent." ROA p. 3450, lines 2–6. He would not be testifying. ROA p. 3453, lines 9–14. He would not be presenting any evidence in mitigation. ROA p. 3449, lines 1–5; ROA p. 3453, lines 17–20.

The judge believed that Roberts/Alkebulanyahh was required by law to be present. ROA p. 3461, lines 10–17. If so, Roberts/Alkebulanyahh indicated that he would become "unruly" and would probably have to be "restrained physically." ROA p. 3461, line 18 – p. 3462, line 10. He planned on being vocal, but not violent. ROA p. 3483, lines 3–10. "A capital case requires the defendant's presence," the judge intoned. ROA p. 3483, line 20. He would force Roberts/Alkebulanyahh to attend if necessary. ROA p. 3484, lines 1–5.

"I have presented all that I want to present," Roberts/Alkebulanyahh explained. ROA p. 3487, lines 5–8. He only wanted to be present for the actual sentencing itself. ROA p. 3492, lines 17 and 18. Essentially, Roberts/Alkebulanyahh wished to be absent during the presentation of the State's case in aggravation. ROA p. 3494, lines 16–19. He had no desire to confront the State's witnesses. ROA p. 3517, lines 2–21. Roberts/Alkebulanyahh added:

> I don't want to look. I don't want to hear. I don't want to hear anything... I don't want to see anything. I have no concern about [sentencing]. I waive any defense in reference to that proceeding. And I would like to waive my right to not even be there if I have that right... I don't want to be at the proceeding. I don't want to see any of the proceedings. I

> definitely don't want to hear the proceedings. " And I have no interest in the proceeding. I'm only interested in the sentence.

ROA p. 3518, lines 4–21. The judge remained unmoved. "Until we hear what the sentence is, you have to be there," he replied. ROA p. 3519, lines 10–13.

With Roberts/Alkebulanyahh thus involuntarily present in the courtroom, the State called its first witness. Roberts/Alkebulanyahh immediately began chanting, "Blessed be Yahweh, El Shaddai, Jehovah, God Almighty, the God of Abraham, Isaac, Ishmael, Jacob and Jesus. " ROA p. 3550, line 17 – p. 3551, line 4. He was then removed from the courtroom in the presence of the jury. Roberts/Alkebulanyahh told the judge that he intended to continue with this behavior because "I do not wish to engage in the proceedings." ROA p. 3551, line 20 – p. 3552, line 5. The judge cautioned:

> If you do it again, I'm not going to remove you from the courtroom. I'm going to put you in the back room where you can hear the testimony and the proceedings as you wish. The glass panel will allow you to watch the proceedings completely. If you wish to turn your back on the proceedings, you have that right.

ROA p. 3552, lines 10–18. He would also have Roberts/Alkebulanyahh shackled and gagged if necessary. ROA p. 3552, line 20 – p. 3553, line 11.

Roberts/Alkebulanyahh again began chanting or praying when the first witness was recalled to the stand. ROA p. 3556, lines 3–5. The judge removed him to a holding cell at

the back of the courtroom that had a glass partition through which he could see the proceedings. ROA p. 3556, lines 18–23. Conversely, the jury could also observe Roberts/Alkebulanyahh. ROA p. 3565, line 21 – p. 3566, line 3; ROA p. 3598, lines 4–6. Roberts/Alkebulanyahh continued to object. ROA p. 3557, lines 19–23. He pleaded with the judge "to exempt me from these proceedings." ROA p. 3558, lines 20 and 21. The judge again denied his request "because it's not within my capability of doing that." ROA p. 3558, line 22 – p. 3559, line 3. Before he was sent to the holding cell, Roberts/Alkebulanyahh stated:

> I believe that I should have the right to waive this proceeding... because these proceedings (sic) has no direct advantage for the defense at all... [T]here is no way that I could contribute nor take away from the proceeding.

ROA p. 3560, lines 2–11.

Roberts/Alkebulanyahh rejected the judge's subsequent offers to allow him back into the courtroom. Each time, he was returned to the holding cell. ROA p. 3596, lines 6–13; ROA p. 3681, lines 3–5; ROA p. 3738, lines 2–9; ROA p. 3765, lines 2–18; ROA p. 3795, lines 15–19. He finally returned to the courtroom to make a closing statement, listen to jury instructions and receive his death sentence. ROA p. 3828, lines 10–13; ROA p. 3840, lines 6–10.

The judge relied solely on South Carolina Criminal Procedure Rule 16 for his ruling. ROA p. 3532, lines 6–16. That Rule states:

> Except in cases wherein capital punishment is a permissible

> sentence, a person indicted for misdemeanors and/or felonies may voluntarily waive his right to be present and may be tried in his absence upon a finding by the court that such person has received notice of his right to be present and that a warning was given that the trial would proceed in his absence upon a failure to attend the court.

Rule 16 was adopted to effectuate a criminal defendant's constitutional right to be present at trial. *State v. Williams*, 292 S.C. 231, 355 S.E.2d 861 (1987).

How the federal issue was decided on direct appeal

On direct appeal to the South Carolina Supreme Court, counsel for Roberts/Alkebulanyahh argued:

> The judge erred by refusing to allow appellant to waive his right to be present at the sentencing phase, instead confining him to a holding cell attached to the courtroom in which he was visible to the jury, particularly since appellant's absence during sentencing was his pro se trial strategy and the State advanced no countervailing reason for requiring him to be present.

The Court affirmed the death sentence on the following grounds, quoted verbatim from the Court's opinion:

1. Although it may, under certain circumstances, be *permissible* [emphasis in original] to allow a capital defendant to be absent from trial, this does not mean there is a constitutional right to be absent. On the contrary ... there is no constitutional right of a defendant not to be present at trial. [Citation and footnote omitted.] Accordingly, no constitutional right of Roberts was violated by his continued presence at trial. [Footnote omitted.]

2. Moreover, Roberts has demonstrated no prejudice from his continued attendance at trial; there is simply no basis to conclude that his death sentence resulted from his presence in a holding cell at the back of the courtroom. [Citation omitted.]

632 S.E.2d at 673-4. Counsel filed a petition for rehearing on these two points. The Court denied rehearing.

WHY THE WRIT SHOULD BE GRANTED

A capital defendant may waive his right to be present at the sentencing phase of his trial, where his absence during sentencing is the product of his trial strategy and the prosecution advances no countervailing reason for requiring him to be present.

The argument that a capital defendant cannot waive his right to be present at trial essentially comes from three United States Supreme Court cases: *Diaz v. United States*, 223 U.S. 442 (1912), *Lewis v. United States*, 146 U.S. 370 (1892), and *Hopt v. Utah*, 110 U.S. 574 (1884). However, the Court has never directly ruled on the issue of whether a defendant can waive his right to presence in a capital case. *L'Abbe v. DiPaolo*, 311 F.3d 93 (1st Cir. 2002). "[T]he issue of whether a defendant must be present at all times in a capital trial has not yet been settled by the Supreme Court." *Moore v. Campbell*, 344 F.3d 1313, 1323 (11th Cir. 2003).

Roberts/Alkebulanyahh is not asserting the existence of some inchoate "right to be absent." Roberts exercised his Sixth and Fourteenth Amendment right to act as his own counsel. See *Faretta v. California*, 422 U.S. 806 (1975). He had a concomitant right to present a defense. See, for example, *Pointer v. Texas*, 380 U.S. 400 (1965). Taken together, these constitutional guarantees afford an accused the personal right to craft the course of his defense. Acting as his own counsel, as a matter of trial strategy, Roberts elected to be absent from the courtroom during the State's case at sentencing.

The State's evidence in aggravation consisted almost entirely of emotionally-wrenching victim impact testimony. Thus far, the South Carolina Supreme Court has chosen to place no limits whatsoever on either the quantity or quality of victim impact evidence the State may introduce at sentencing, so that the State's case in aggravation now resembles nothing

so much as a memorial service for the victim.

How does a capital defendant (or, for that matter, defense counsel) respond to such testimony? By downplaying or ignoring it, usually: cross-examination of victim impact witnesses is virtually nonexistent. News reports routinely describe the capital defendant as appearing "emotionless" during the presentation of victim impact testimony.

Roberts'/Alkebulanyahh's decision to be absent from the courtroom during sentencing was a legitimate, strategic exercise of his Sixth and Fourteenth Amendment right of self-representation and right to present a defense. The South Carolina Supreme Court's opinion, if left uncorrected, would allow trial judges to recognize or deny these fundamental constitutional rights at will, as it offers absolutely no guidance on this point. (Strangely enough, it seems the Court would allow a disruptive defendant to be absent without hesitation, but not one who, like Roberts/Alkebulanyahh, attempts to comply with the rules by making a formal motion.)

Next, given the nature of capital sentencing in South Carolina, the harmless error standard adopted by the South Carolina Supreme Court in this case was virtually impossible to satisfy. The Court writes that "there is simply no basis to conclude that [Roberts'] death sentence resulted from his presence in a holding cell at the back of the courtroom." Why not? In *State v. McClure*, 342 S.C. 403, 537 S.E.2d 273, 275 (2000), the Court noted that "the evaluation of the consequences of an error in the sentencing phase of a capital case are more difficult because of the discretion that is given to the sentencing jury [in South Carolina]. A capital jury can recommend a life sentence for any reason or no reason at all."

Finally, the Court's opinion stands harmless error on its head by requiring the defendant to prove that a constitutional error was harmful. Since the defense in South Carolina (as well as the prosecution and, ultimately, this Court) never learns precisely why a capital jury sentenced a defendant to death, the burden imposed by the Court could never be satisfied. The proper harmless error standard is

instead to be found in *Chapman v. California*, 386 U.S. 18, 24 (1987): "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it is harmless beyond a reasonable doubt." That cannot be said in the present case, where Roberts was not only present against his will, but caged, as if he were an immediate threat to the remaining participants in his trial.

For the trial judge also compounded the error by confining Roberts/Alkebulanyahh to a holding cell in which he was visible to the jury. As the Supreme Court explained in *Illinois v. Allen*, 397 U.S. 337, 344 (1970):

> Trying a defendant for a crime while he sits bound and gagged before the judge and jury would to an extent comply with that part of the Sixth Amendment's purposes that accords the defendant an opportunity to confront the witnesses at the trial. But even to contemplate such a technique, much less see it, arouses a feeling that no person should be tried by shackled and gagged except as a last resort. Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold.

When the judge imprisoned Roberts/Alkebulanyahh within the

courtroom, he achieved the same effect in the jury's eyes as if he had ordered Roberts/Alkebulanyahh bound and gagged. The only inference a reasonable juror could have drawn was that Roberts/Alkebulanyahh had become a threat to those in the courtroom – including the jurors themselves.

In conclusion, Roberts/Alkebulanyahh voluntarily waived his right to be present at sentencing as a pro se trial strategy. The State advanced no reason to deny his request. The trial judge erred by denying the motion and then compounded the error by confining Roberts/Alkebulanyahh to a holding cell in view of the jury.

CONCLUSION

The Court should issue a writ of certiorari to review and reverse the death sentence of Tyree Alphonso Roberts a/k/a Abdiyyah Ben Alkebulanyahh.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

No. _____

In The
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TYREE ALPHONSO ROBERTS
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v.

STATE OF SOUTH CAROLINA,
Respondent.

On Petition for Writ of Certiorari to the South Carolina Supreme Court

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APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,
v.
Tyree Alphonso Roberts, a/k/a Abdiyyah Ben Alkebulanyahh, Appellant.

Appeal From Beaufort County
Daniel F. Pieper, Circuit Court Judge

Opinion No. 26185
Heard May 24, 2006 – Filed July 24, 2006

AFFIRMED

Chief Attorney Joseph L. Savitz, III, and Assistant Appellate Defender Robert M. Dudek, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General

Donald J. Zelenka, Assistant Attorney General S. Creighton Waters, all of Columbia, and Solicitor Isaac McDuffie Stone, III, of Beaufort, for Respondent.

JUSTICE WALLER: This is a capital case. Roberts was convicted of the murder of two Beaufort County Sheriff's Deputies and was sentenced to death. The sole issue he raises on appeal is whether the trial court erred in requiring him to remain present during the sentencing phase of his trial. We affirm the convictions and sentence.

FACTS

In January 2002, Roberts lived in a trailer owned by Brenda Smith on Riley Road in Beaufort County. Also residing at the trailer were Smith's husband, Isaac, and Roberts' wife Nzuri. At the time of the crime in this case, a girl named Kimberly Blake, with whom Roberts had an infant daughter, was also staying there. On January 8, 2002, Kimberly Blake asked her friend, Strawberry Washington, to call police to come to the house to assist her in leaving because Roberts had hit her. Beaufort County Sheriff's Deputies Dyke Coursen and Dana Tate responded. According to Kimberly Blake, when police arrived, Roberts hid in the bedroom closet with his rifle. He gave Kimberly the okay to go out of the bedroom. She left the bedroom and Brenda Smith gave the officers permission to search the bedroom. Officers Coursen and Tate went into the bedroom. Smith and Blake heard gunshots. Blake ran outside and down the road. She was joined shortly after by Roberts coming through the woods with a gun in his hands. Roberts stated, "I just killed those two white bitches and I'm going to

say it was self-defense." Blake left Roberts and returned to the scene to talk to police.

When backup officers responded to the scene, they found officers Coursen and Tate dead; Coursen had suffered six gunshot wounds, Tate had seven. Roberts was subsequently found hiding in the mud under a bridge with a shoulder and hip wound. Roberts was arrested. At the time, he had a black fanny pack carrying ammunition for an M-14 assault rifle, a cell phone and a knife. Police subsequently found a rifle magazine and an SKS assault rifle in the area in which Roberts had fled. The bullets and casings recovered from the victims and the scene of the crime were conclusively matched to the assault rifle.

Roberts was charged with capital murder. At the guilt or innocence phase of trial, he chose to represent himself. However, two attorneys remained as stand-by counsel to assist him at trial. While the jury was deliberating, Roberts indicated to the trial court that if the jury returned a guilty verdict, he did not intend to participate at sentencing. He also indicated he did not want his stand-by attorneys to present a defense. Roberts indicated that if the trial court required him to be present at the sentencing hearing, he would be unruly and would have to be restrained.

The jury convicted Roberts of two counts of murder. Roberts advised the court he did not intend to offer any mitigating evidence and expressed his desire to absent himself from the sentencing; he indicated he would probably be unruly if required to be present. Stand-by counsel conferred with Roberts and then advised the court as follows:

> He says that he doesn't agree to any changes in his status as attorney of record, and that if the court makes any change,

> they'll have to do it on their own motion. . . and that if the judge - if the attorneys on stand-by are to perform in any capacity, the judge will have to order that on his own motion. . . He says that he doesn't want to be present in this courtroom in order to hear the evidence in the second phase. And that if the judge - but he does not intend to disrupt the proceedings. . . but if the judge determines that he should be in one of the side rooms . . . that's a decision that his honor will have to make himself. He says that he is withdrawing from any further discussion with the court. . . . he does not intend to cooperate with stand-by counsel, to bring any witnesses. . . .

The trial court was concerned with Roberts' decision, but was also disturbed that to appoint counsel to represent Roberts at sentencing might compromise his right to proceed pro se. Roberts continued to maintain that he did not intend to confront any witnesses, and did not want to see the witnesses. He persisted in advising the court that if forced to remain present, he would be disruptive. As neither party could point to specific case law governing the circumstances, the court determined the best course of action was to proceed with Roberts present in the courtroom, with the condition that if he became disruptive, the trial judge would take such action as necessary. Roberts indicated his desire that counsel

not represent him in any way, but ultimately decided counsel could
remain as stand-by counsel to object to the introduction of improper evidence. The sentencing proceeded with Roberts seated at counsel table. As soon as the first witness was sworn, Roberts stood and began to chant aloud, "Blessed be Yahweh, El Shaddai, Jehova, God Almighty, the God of Abraham, Isaac, Ishmael, Jacob, and Jesus." He was told by the court to be seated, and when he continued chanting, he was removed and a brief hearing was held in the hearing room at the back of the courtroom. Roberts was brought back into the courtroom and once again began chanting when the witness began to testify. The jury was removed, and Roberts was placed in a conference room at the back of the courtroom which had a glass partition to allow him to hear and see into the courtroom. He was initially restrained, but the restraints were removed before the jury was
returned to the courtroom.

Throughout sentencing, the court offered to allow Roberts to come back into the courtroom if he could do so without being disruptive; however, Roberts indicated he would rather remain in the back room. Roberts ultimately returned to the courtroom to make a closing statement to the jury. After deliberations, the jury found the existence of the two aggravating circumstances and recommended a sentence of death. Roberts appeals.

ISSUE

Did the trial court commit reversible error in refusing Roberts' request to be completely absent from sentencing?

DISCUSSION

It is well-established that an accused may waive the right to counsel and proceed pro se. State v. Reed, 332 S.C.

35, 503 S.E.2d 747 (1998), citing Faretta v. California, 422 U.S. 806 (1975). Although a defendant's decision to proceed pro se may be to his own detriment, it "must be honored out of that respect for the individual which is the lifeblood of the law." Id. *Citing* State v. Bell, 293 S.C. 391, 360 S.E.2d 706, 711 (1987), Roberts asserts a defendant need not be present at all times during a capital trial. We find Bell inapplicable to the facts of this case. There, the defendant twice disrupted the guilt-phase closing argument of his defense counsel, objecting to the trial proceeding on the Sabbath. After being warned against such conduct, Bell again disrupted the proceedings, and was removed to a holding cell without the benefit of any audio hookup. This Court held that the right to be present at trial could be waived, and that Bell's disruptive conduct amounted to a waiver of the right to be present at trial, such that he could not be heard to complain.

Although it may, under certain circumstances, be permissible to allow a capital defendant to be absent from trial, this does not mean there is a constitutional right to be absent. On the contrary, this Court has specifically held there is no constitutional right of a defendant not to be present at trial. State v. Moore, 308 S.C. 349. 417 S.E.2d 869 (1992). [1] Accordingly, no constitutional right of Roberts was violated by his continued presence at trial. [2] Moreover, Roberts has demonstrated no prejudice from his continued attendance at trial; there is simply no basis to conclude that his death sentence resulted from his presence in a holding cell at the back of the courtroom. Accord State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998), cert. denied, 525 U.S. 1077, 119 S.Ct. 816, 142 L.Ed.2d 675 (1999) (death penalty defendant failed to show prejudice from presence in jury room of religious pamphlet concerning God's view of death penalty, where misconduct did not affect jury's verdict).

CONCLUSION

Roberts' convictions and sentence are affirmed. We have conducted the mandatory review required by S.C. Code Ann. § 16-3-25 (1985). The evidence indicates the sentence was not the result of passion, prejudice, or any other arbitrary factor, the evidence supports the finding of the aggravating circumstances, and the sentence is not disproportionate to that imposed in similar cases. State v. Sapp, 366 S.C. 283, 621 S.E.2d 883 (2005), cert. denied, ___ U.S.___ 2006 WL
565552 (May 15, 2006); State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999), cert. denied, 529 U.S. 1025 (2000); State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991), cert. denied, 503 U.S. 993 (1992); State v. South, 285 S.C. 529, 331S.E.2d 775, cert. denied 474 U.S. 888 (1985).

AFFIRMED.

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur.

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[1] The defendant in Moore asserted he had a right not to be present at trial in order to preclude an in-court identification of him by the State's witnesses. However, our holding in Moore unequivocally held there is no constitutional right not to be present at trial. Moore applies not only where the defendant wishes to prevent an identification, but applies with equal force in any case in which the defendant desires to absent himself from trial.

[2] Moreover, Rule 16, SCRCrimP, states that, "except in cases wherein capital punishment is a permissible sentence, a person indicted for misdemeanors and/or felonies may voluntarily waive his right to be present and may be tried in his absence. . . " In a similar situation, the California Supreme Court recentlyheld a "capital defendant may not voluntarily waive his right to be present during . . . those portions of the trial in which evidence is taken, and . . . may not be removed from the courtroom unless he has been disruptive or threatens to be disruptive." People v. Huggins, 41 Cal. Rptr. 3d 593 (2006). Similarly, the Alabama

Court of Criminal Appeals has recognized that until 1997 (when Alabama Rules Crim. Proc., Rule 9.1(a), (b)(2) was amended), a defendant charged with a capital offense could not waive his right to be present at any phase of the capital trial. Robitaille v. State, ___So.2d ___, 2005 WL 3118795 (Ala. Crim. App. 2005).

August 11, 2006

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South Carolina Commission on Indigent Defense
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Re: State v. Roberts, aka Alkebulanyahh

Dear Counsel:

The Court has issued the following Order on your Petition for Rehearing in the above matter:

"Petition for Rehearing is denied.

s/ Jean H. Toal	C.J.
s/ James E. Moore	J.
s/ John H. Waller, Jr.	J.
s/ E.C. Burnett, III	J.
s/ Costa M. Pleicones	J.

August 11, 2006."

The remittitur is today being forwarded to the lower court.

Very truly yours,
s/
Daniel E. Shearouse, Clerk

DES/dmh
cc: Assistant Attorney General S. Creighton Waters
The Honorable Isaac McDuffie Stone, III